

No. 83-1189

FILED  
FEB 16 1984  
ALEXANDER L. STEVAS  
CLERK

IN THE

# Supreme Court of the United States

October Term, 1983

BOARD OF EDUCATION OF THE NORTHPORT-EAST  
NORTHPORT UNION FREE SCHOOL DISTRICT and  
"ABBY" and "RICHARD" by their Guardian *ad litem*,  
JOHN P. BRACKEN,

*Petitioners,*

vs.

GORDON M. AMBACH, individually and in his official capacity  
as Commissioner of Education of the State of New York, and  
JOSEPH J. BLANEY, individually and in his official  
capacity as Acting and/or Deputy Commissioner of Education  
of the State of New York,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ROBERT D. STONE  
*Counsel and Deputy Commissioner*  
*for Legal Affairs*  
State Education Department  
State Education Building  
Albany, New York 12234  
(518) 474-8864

JAMES H. WHITNEY  
*Of Counsel*

### Questions Presented for Review

1. Was the New York Court of Appeals correct in holding that the denial of a high school diploma for failure to meet academic standards established by respondent Commissioner of Education did not deprive petitioners Abby and Richard of a protected property interest, for purposes of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Was the New York Court of Appeals correct in holding that the denial of a high school diploma for failure to meet academic standards established by respondent Commissioner of Education did not infringe upon the liberty of petitioners Abby and Richard, for purposes of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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DISTRICT and "ABBY" and "RICHARD" by their  
Guardian *ad litem*, JOHN P. BRACKEN,

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capacity as Commissioner of Education of the State of  
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**BRIEF IN OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF NEW YORK**

Respondents Gordon M. Ambach and Joseph J. Blaney, individually and as Commissioner and Deputy Commissioner of Education of the State of New York respectively, respectfully pray that the petition herein for writ of certiorari to the Court of Appeals of the State of New York be denied.

### **Opinions Below**

The decision of the New York State Court of Appeals affirming the order of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 60 NY2d 758. The Appellate Division decision is reported at 90 AD2d 227.

### **Jurisdiction**

The asserted basis of jurisdiction is 28 USC 1257(3), based upon an alleged deprivation of a property right and infringement of a liberty interest of petitioners "Abby" and "Richard" under the Fourteenth Amendment to the United States Constitution.

## Constitutional Provisions, Statutes and Regulations Involved

### Amendment XIV, Section 1, United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### 28 U.S. Code, Section 1257(3):

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

### Title 8 Official Compilation Codes Rules and Regulations of the State of New York:

#### Section 103.2 High school diplomas.

(a) Local diploma. In order to secure a local high school diploma, the following requirements must be met:

(1) The satisfactory completion of an approved four-year course of study of a minimum of 16 units or their equivalent as determined by the



Commissioner in a registered four-year or six-year secondary school, including English, social studies including American history, science, mathematics, health, physical education and such other special requirements as are required by statute and established by the Commissioner of Education.

(2) The demonstration of competency in the basic skills:

(i) by passing the following examinations:

(a) Effective June 1, 1979 through May 31, 1981, either the Basic Competency Test in Reading or the Regents Comprehensive Examination in English, and either the Basic Competency Test in Mathematics or a Regents examination in mathematics;

(b) Effective June 1, 1980 through May 31, 1981, the examinations set forth in clause (a) of this subparagraph, and either the Basic Competency Test in Writing Skills or the Regents Comprehensive Examination in English;

(c) Effective June 1, 1981, either the Regents Competency Test in Reading and the Regents Competency Test in Writing or the Regents Comprehensive Examination in English, and either the Regents Competency Test in Mathematics or a Regents examination in mathematics. Students scheduled to complete high school in June 1981 may meet the testing requirements for reading, writing and mathematics by having passed the Basic Competency Tests in these skills before February, 1979; or

(ii) by demonstrating, in the judgment of the school principal, competence in academic skills comparable to that required by subparagraph (i) of this paragraph, through alternative testing techniques satisfactory to the Commissioner of Education, provided that the provisions of this

subparagraph shall be limited to pupils with handicapping conditions and pupils whose native language is other than English who first enter, after grade eight, schools where the predominant language of instruction is English. For pupils who are expected to graduate in June, 1979, each school district or non-public school shall make application to the Commissioner for authorization of the school principal to determine the competency of a pupil in accordance with the provisions of this subparagraph, no later than 60 days prior to the pupil's expected date of graduation. The application shall include the name of the pupil for whom the alternative testing technique is used, the reasons for the use of any alternating testing technique, and the nature of such alternating testing technique. A copy of the application shall be placed in the pupil's file. Each school district or nonpublic school shall report to the State Education Department within 15 days after any diploma is conferred on the basis of this subparagraph in June of 1979, the name of the recipient of each diploma. For pupils who graduate after June 1979, each school district or non-public school shall report to the State Education Department, within 15 days after any diploma is conferred on the basis of this subparagraph, the name of the recipient of each diploma, the reason for the use of any alternative testing technique, and the nature and results of such alternating testing technique; or

(iii) by demonstrating competency in academic skills comparable to that required by subparagraph (i) of this paragraph, through alternative tests satisfactory to the Commissioner of Education. The provisions of this subparagraph shall be limited to pupils who have not passed the examination set forth in subparagraph (i) because of extraordinary administrative circumstances not caused by the willful act of the pupil or of a

teacher or administrator. Each school district or nonpublic school shall apply to the State Education Department for permission to use such alternative tests stating the name of the pupil, the reason for the use of any alternative tests, or evidence, and the nature and results of such alternative tests. The department shall promptly evaluate such information and advise the district or nonpublic school as to whether such permission is granted or denied.

### Statement of the Case

This proceeding was commenced on August 15, 1979 by petitioner Board of Education to prohibit the enforcement of an order issued by respondent Blaney, the former Executive Deputy Commissioner of Education of the State of New York, directing the Board of Education to provide the State Education Department with the names and addresses of students who were issued high school diplomas in June, 1979, without having met the requirements for such diplomas set forth in Part 103 of the Regulations of the New York State Commissioner of Education.

The individual petitioners, Richard and Abby, are two handicapped students in the Northport-East Northport Union Free School District, who had received high school diplomas from the Board of Education in June, 1979 without having satisfied all of the requirements for such diplomas. They were permitted to intervene in this proceeding by a decision of Mr. Justice Robert Williams of the New York State Supreme Court, dated January 24, 1980, pursuant to which John P. Bracken, Esq. was appointed their guardian *ad litem*.

Abby, aged 20 when graduated in 1979, had been classified as neurologically impaired and was receiving her education in a program operated by the Board of Cooperative Educational Services of the Third Supervisory District of Suffolk County (BOCES) at Dix Hills, New York. Richard, aged 21 in 1979, had been classified as trainable mentally retarded and was receiving his education in a program run by the same BOCES at Melville, New York. Abby's program included two-thirds of her day spent in a work study program in horticulture and silk screening which had not been approved by the Commissioner of Education for such purpose. The other one-third of her day was spent in an

academic program which, based upon the tasks described in her Individualized Education Program (IEP), was at the second grade level in mathematics and the third grade level in reading. Abby had passed the State mandated Basic Competency Test in reading but failed the Basic Competency Test in math. She was described by her teachers as being unable to understand mathematical concepts because of her neurological impairment. Richard was not given either of the Basic Competency Tests, because he would not be able intellectually to pass either test. His IEP focused upon listening and speaking skills, simple methods of silk-screening and linoleum block printing, and elementary horticulture.

Minimum competency testing programs were first introduced in New York State and used on an optional basis in schools beginning in 1962. Subsequently, New York State became concerned over the decrease in college board scores, and reports that increasing numbers of students were graduating from high school lacking basic skills, particularly in reading and mathematics. In the years between 1969 and 1971, the State Examination Task Force in the State Education Department examined the entire State examination program and recommended that additional steps be taken to encourage and support the teaching of basic skills for students who are seeking locally issued diplomas.

Beginning in 1965 students in New York public schools in grades three, six and nine were required to take statewide examinations in reading and mathematics as part of the pupil examination program.

In 1973, the State began development of the basic competency test program, with the assistance of educators in the public school system throughout the State as to the general direction that the basic

competency tests should take. After development of the initial tests, a pre-test was conducted in 1974. The objectives of that pre-testing were to determine how students reacted in the actual test situation, how long it took them to answer the questions, whether the directions that were given were adequate, and to get a further item analysis of the questions.

The tests were developed in the same manner as tests have been developed by the New York State Education Department for over a century. The tests were designed to have an average difficulty level for the items of 80%, that is, the average student in the ninth grade could be expected to answer 80% of the questions correctly. That level of difficulty, established in 1974, has remained the same for all subsequent basic competency tests.

In March of 1976, the basic competency tests were made a requirement for a high school diploma for those students graduating in June, 1979 and for each year thereafter. Consequently, more than three years prior to the graduation of the students here in question, Abby and Richard, the requirement for passing basic competency tests as a condition for graduation with a high school diploma was already in existence. In June, 1976 the New York State Board of Regents adopted an amendment to section 3.45 of the Rules of the Board of Regents conditioning receipt of a high school diploma upon successful completion of the basic competency tests. Section 103.2 of the Regulations of the Commissioner of Education was amended in July, 1978 to incorporate the more specific requirements of the competency tests. It should be noted that neither the policy adopted in March, 1976 nor the regulations adopted in July, 1978 made any provision for the use of alternative testing techniques for handicapped students taking those examinations or any exception from the diploma requirement for handicapped students who could not be

expected to pass the tests. School districts were specifically advised in May, 1976 that the competency test requirement for receipt of a high school diploma could not be waived for handicapped students.

Since January of 1977, the basic competency tests have been administered twice each year, in January and June, on a regular basis with the exception of 1979, when an additional administration was provided in August.

The basic competency tests in reading measured reading comprehension and, with the exception of the administrations in 1974 and 1975, included items directly related to the New York State language arts syllabus. Similarly, the mathematics competency test measured basic computational skills and knowledge of certain mathematics concepts, and included problem solving questions, all directly related to the State mathematics syllabuses.

In March, 1979, the Regents authorized the use of alternative testing techniques for pupils with handicapping conditions. While the Regulations of the Commissioner of Education had, prior to 1979, authorized the issuance of only two types of diploma, namely Regents and local, it apparently was not clear to school districts that only those diplomas were authorized, and it was reported that some districts were issuing different types of diploma or were issuing certain types of "certificate" to students who failed to meet diploma requirements. Consequently, the regulations were amended in March, 1979, to prohibit the issuance of any diplomas other than those specifically authorized in the Regulations of the Commissioner of Education. An exception was made for students who are classified as handicapped, who perform intellectually in the range of educable or trainable mentally retarded, and who have successfully completed individualized education

programs. Those students were authorized to receive certificates from the school. That authorization recognizes that some students cannot be expected to pass the competency tests because of handicapping conditions, but should receive some recognition of the fact that they have successfully completed their individualized education program. Non-handicapped students who fail to meet basic competency testing requirements do not receive either certificates or diplomas.

The decision of the New York State Supreme Court, which is reported at 107 Misc. 2d 830, held that respondents acted within the authority conferred upon the Board of Regents by the State Constitution and State Education Law, and that the denial of diplomas to handicapped students who do not meet the standards established in the State's minimum competency tests would not violate either section 504 of the Rehabilitation Act of 1973 (29 USC 794) or the Education of the Handicapped Act as amended (20 USC 1401). The Court also rejected petitioners' contention that respondents had violated their right to equal protection of the law. However, the Court found that for purposes of the individual petitioners' claim that their right to due process of law pursuant to the Fourteenth Amendment to the United States Constitution had been infringed, such petitioners had a property interest in the legitimate expectation of receipt of a diploma and that the denial of a diploma might have a stigmatizing effect on such petitioners. The Court further held that the two individual petitioners had not received timely notice of the competency testing requirement, and permanently enjoined the enforcement of the administrative order directing the Board of Education to divulge the names and addresses of the students who had not met all of the requirements for receipt of a high school diploma but had received a diploma.



In a unanimous decision which is reported at 90 AD2d 227, the Appellate Division, Third Judicial Department of New York State Supreme Court, held that the individual petitioners had not been deprived of either property or liberty, without due process of law, because neither student had a legitimate expectation of receiving a high school diploma without passing the competency examinations and because respondents had not stigmatized either student. The Appellate Division held that the allegedly inadequate notice of the testing requirement given to the students was irrelevant, in view of the clear evidence in the record that neither student could be reasonably expected ever to pass both of the required examinations. With regard to any handicapped youngster who might have been capable of passing the tests, although no other handicapped student was a party to this proceeding, the Appellate Division found that adequate notice of the testing requirement was given. As so modified, the decision of the lower Court was affirmed.

The New York Court of Appeals in a decision reported at 60 NY2d 758, affirmed the Appellate Division order, noting that neither student petitioner had a reasonable expectation of receiving a high school diploma without passing the competency tests. The Court also found that the students had not been denied adequate notice of the testing requirement.

Petitioners' request for a stay of the administrative order directing the Board of Education to release the names and addresses of the diploma recipients who had not met State requirements for receipt of a diploma pending a determination of their petition for a writ of certiorari was denied on November 18, 1983 by the Hon. Thurgood Marshall, Associate Justice of this Court.

## ARGUMENT

## POINT I

This proceeding does not meet the criteria governing review on certiorari set forth in Rule 17.

At the outset, respondents point out that there is no basis for a petition for writ of certiorari on behalf of the Board of Education. The Federal question asserted in the petition involves an alleged deprivation of liberty and property interests of the individual petitioners, Abby and Richard, in violation of the provisions of the Fourteenth Amendment to the United States Constitution. Those claims were raised by Abby and Richard in the Courts below, but were never asserted by petitioner Board of Education, nor could the Board of Education have done so. It is of course well settled that a litigant may assert only his own constitutional rights (*McGowan v. Maryland*, 366 US 420 [1957], and may not assert the rights of others vicariously (*Broadrick v. Oklahoma*, 413 US 60 [1973]; *California Bankers Assoc. v. Shultz*, 416 US 21 [1974])).

In view of the fact that the only rights which respondents are alleged to have violated are personal rights of Abby and Richard, the Board of Education has failed to demonstrate any justiciable case or controversy involving its disagreement with the policy of the New York State Board of Regents and Commissioner of Education concerning standards for graduation from high school. Consequently, respondents submit that the petition should be dismissed with regard to the Board of Education.

In accordance with Rule 17.1(b) of this Court, review by writ of certiorari may be granted when a State court of last resort has decided a Federal question in a way in

conflict with the decision of a Federal Court of Appeals. Petitioners refer to the decision in *Brookhart v. Illinois State Bd. of Ed.*, 697 F.2d 179 [7th Cir., 1983] and *Debra P. v. Turlington*, 644 F.2d 397 [5th Cir., 1981] as allegedly conflicting with the decision of the New York Court of Appeals in this proceeding. There must, of course, be a real conflict on the same matter of law or fact, not merely in the general principles used in the decisions. As will be demonstrated in Points II and III of this brief, there are substantial differences in the facts of both *Brookhart* and *Debra P.* from those in this proceeding, which provide an understandable basis for the different conclusions revealed in those decisions with regard to an alleged infringement of a liberty interest and deprivation of property. This is particularly significant with regard to petitioners' assertion of a property interest in a high school diploma because the State law must be examined to ascertain the existence of such right or interest.

A writ of certiorari may also be granted to review a State court decision which concerns an important question of Federal law which has not been, but should be, settled by this Court, or which conflicts with the applicable decisions of this Court (R. 17.1[c]). In this instance, petitioners have not identified any specific decision of this Court with which the decision of the New York Court of Appeals is claimed to be in conflict, and respondents submit that there is no conflict with any decision of this Court.

Although to the best of our knowledge this Court has not had occasion previously to pass upon requirements for receipt of a high school diploma, the novelty of the issue is not sufficient to warrant the granting of the petition in this proceeding. Petitioners attempt to demonstrate the importance of the question by

suggesting that handicapped students are excluded from "full participation in American society" as a result of the State's policy regarding requirements for receipt of a high school diploma. Respondents point out that the right to a "free, appropriate public education" (20 USC 1401) is not at issue here, and that the impact of respondents' policy upon handicapped children in terms of their participation in American society is at best speculative. Respondents point out that the statements in petitioners' brief that handicapped students drop out of school once they realize that they cannot obtain a diploma because of the testing requirement, and that Abby would not be eligible for either a diploma or certificate upon leaving high school, have absolutely no support in the record. Respondents believe that both Abby and Richard would be eligible for a certificate pursuant to section 103.5 of the Regulations of the New York Commissioner of Education.

In essence, petitioners seek to set aside an educational policy decision of the New York State Board of Regents and Commissioner of Education, by invoking the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, this Court has stated that the Due Process Clause does not authorize the Court to assess the wisdom of the State's action (*Wood v. Strickland*, 420 US 308 [1975]; *Rice v. Norman Williams Co.*, \_\_\_\_\_ US \_\_\_\_\_, 102 S.Ct. 3294 [1982]; *Vance v. Bradley*, 440 US 93 [1979]).

## POINT II

The decision below does not conflict with the decision in *Brookhart v. Illinois State Bd. of Ed.*

Petitioners assert that there is a direct conflict between the holding of the Court below and that of the U.S. Court of Appeals for the Seventh Circuit in *Brookhart v. Illinois State Bd. of Ed., supra*, and that the facts in both cases are identical.

*Brookhart* was an action brought by fourteen elementary and secondary school students having a broad range of handicapping conditions, including physical disabilities, learning disabilities, mental retardation and multiple handicaps, to challenge the imposition of a minimal competency test as a condition for receipt of a high school diploma from the Peoria, Illinois District No. 150. The district decided in the spring of 1978 to impose the requirement in the spring of 1980. However, the District Court found that the secondary school students did not receive notice of the requirement until their junior year in high school. The Court of Appeals rejected plaintiffs' contention that the denial of a diploma to handicapped students on the basis of a failure to attain minimal skills as determined by a competency test violated the Education for All Handicapped Children Act (20 USC 1401) or section 504 of the Rehabilitation Act of 1973 (29 USC 794) but did find that the District had deprived the students of a protected liberty interest without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. The liberty interest at stake was the reputation of the students, which the Court found would be stigmatized by the withholding of a diploma from them. The Court also found that the students had a right conferred by State law to receive a diploma if they met the requirements in effect prior to the imposition of the testing requirement.

An analysis of the facts reveals significant differences between students challenging the Peoria testing program and those challenging the New York State program. The plaintiff class in *Brookhart* had a wide range of disabilities, and some of the class members could presumably have passed the tests involved in *Brookhart*, with sufficient notice. In this proceeding, the pleadings prepared by petitioners affirmatively alleged that neither Abby nor Richard would be able to pass both the Basic Competency Tests. In addition, the record includes testimony of school officials, including Abby's teacher, which supports those allegations. With regard to Abby's ability to pass the mathematics portion of the BCTs, her teacher testified that Abby had "no understanding of mathematical concepts whatsoever", and "there was no way she could pass the basic competency testing". It is also apparent from the individualized education programs for both students that they were performing at a level of skills expected of elementary students. In view of their inability to ever pass the examinations, the Court below understandably concluded that the issue of notice of the examination requirement to Abby and Richard was irrelevant.

Even if notice had been relevant, there are significant differences between the Peoria testing program and that in New York State. Students in New York received notice of the competency testing requirement three years before they were scheduled to graduate, while in Illinois students were notified approximately one to one and one-half years before the imposition of the testing requirement.

In this proceeding, respondents established to the satisfaction of the Court below that there was a correlation between the State curriculum and the skills and concepts tested in the BCTs, and that the only reason particular handicapped students may not have been instructed to develop those skills or learn those concepts was because they could not benefit from such instruction. It is apparent from the *Brookhart* decision that the Court in that case was not satisfied with the explanation by school officials of the reasons why members of the plaintiff class may not have been exposed to material included in the school district imposed competency test. The degree of familiarity with the material to be tested is, of course, especially significant in determining the adequacy of the notice given by school officials of the testing requirement.

The BCTs were designed to have an average difficulty level of 80%, that is, the average student in the ninth grade could be expected to answer 80% of the questions. It is not clear from the Seventh Circuit decision in *Brookhart* at what grade level students in that case were expected to perform. The degree of difficulty of the test would also be significant in determining the adequacy of any notice to be given to students.

In view of all of these differences, it cannot fairly be said that the facts in *Brookhart* are identical to those of this proceeding.

Although the *Brookhart* decision did find a liberty interest held by the plaintiff class, relying in part upon the decision of the trial court in this proceeding, respondents respectfully assert that the Seventh Circuit decision erred in its conclusion.



The liberty interest protected by the Fourteenth Amendment relates to one's reputation in the community, although reputation by itself is not a liberty interest sufficient to invoke the procedural protection of the Fourteenth Amendment (*Paul v. Davis*, 424 US 693 [1976]). The Due Process Clause affords protection against unfair charges by the government against an individual which directly relate to his honor, integrity, reputation and good name where such action impinges upon some right or property interest (*Board of Regents v. Roth*, 408 US 564 [1972]). This Court, in *Paul v. Davis*, *supra*, emphasized that a stigma, such as defamation, was *per se* insufficient, and that the governmental action must also take away a right previously held under State law. As will be discussed above in Point III of this brief, there never has been a right to, or even an expectancy of, a diploma in New York State for those who fail to meet standards for a diploma set by the State.

In order to constitute a deprivation of liberty, the stigmatizing statement must be false (*Codd v. Velger*, 429 US 624 [1977]) and it must be made public by the governmental entity (*Bishop v. Wood*, 426 US 341 [1976]). In this instance, respondents have, at the most, identified petitioners as not having met the requirements for a high school diploma, which is absolutely true. It is also clear that respondents have not publicly made any statement about either individual petitioner. Therefore, petitioners Abby and Richard do not have a protected liberty interest which has been infringed by respondents.

For all of these reasons, it is respectfully submitted that the alleged conflict between the decisions in *Brookhart* and this proceeding does not afford an adequate basis for review of the decision below.



## POINT III

The decision below does not conflict with the decision in *Debra P. v. Turlington*.

Petitioners also assert that the decision below is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Debra P. v. Turlington*, *supra*, involving the constitutionality of the Florida State Student Assessment Test.

*Debra P.* was a class action brought on behalf of 3 separate groups of students, two of which were limited to black students, to challenge the Florida test under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964 (42 USC 2000d) and the Equal Educational Opportunities Act (20 USC 1703). The record before the Court revealed that in May 1979, 20 percent of the State's black high school seniors had not passed the test, as compared with approximately two percent of the white seniors.

The Court held that Florida could not withhold diplomas on the basis of a test which may have covered matters not included in the students' curriculum, and remanded the case to the District Court for the purpose of taking evidence of the curricular validity of the test. In ruling for the plaintiffs, the Court of Appeals found that the State may have violated their right to due process and equal protection of the law secured by the Fourteenth Amendment, and also violated the Equal Educational Opportunities Act. The Court found an implied property right to a diploma as a "logical extension of successful attendance".

Respondents first note that because *Debra P.* was decided on statutory, as well as constitutional grounds, and the statute involved in *Debra P.* is not at all relevant in this proceeding, there is no basis for asserting that there is an irreconcilable conflict between the decision below and that in *Debra P.*

There are also clear factual differences. *Debra P.* did not deal with the rights of handicapped students *per se*; rather it addressed the plight of black students in a formerly racially segregated State school system. Implicit in the decision is the logical assumption that but for such past discrimination, black students would have had an equal opportunity to acquire the skills and knowledge tested by the Florida State Student Assessment Test and would have performed as well as white students on such test. In this proceeding, the two students have received instructional programs designed to meet their instructional needs, and have not been excluded from any instructional program on the basis of an educationally irrelevant factor, such as their race.

A determination whether a student has a property right in a high school diploma for purposes of the Fourteenth Amendment must be based upon an analysis of State law as to the nature of the alleged right. The Fourteenth Amendment did not create additional rights, but only extended the protection of the Federal Constitution over property rights which existed under State law (*Mobile and O.R. Co. v. Tennessee*, 153 US 486 [1893]). This Court has indicated that if no State-established right exists, there is no question for the Court to determine under the Due Process Clause of the Fourteenth Amendment (*Demorest v. City Bank Farmers Trust*, 321 US 36 [1944]).

Respondents do not deny that a high school diploma is a valuable credential, but the fact that it is of value is not determinative of the issue of whether petitioners Abby and Richard have a property interest in a diploma under New York law, for purposes of the Due Process Clause. The procedural protection of property afforded by the Fourteenth Amendment safeguards the security of interests which a person has already acquired in specific benefits (*Board of Regents v. Roth, supra*). In *Roth*, this Court noted that a protected property interest involves more than a unilateral expectation of receipt of a particular benefit, and found that a college instructor employed on an annual contract basis had no property right in future employment beyond the duration of his employment contract.

Although each student in New York State has a statutory right to a free elementary and secondary education at public expense, it does not follow that each student also has a property right to a diploma. The Court below held that Abby and Richard did not have a legitimate expectation of receiving a diploma, because the relevant decisional law in New York does not find that a diploma is merely an extension of the educational process, as may be the case in other states. The New York courts have found that a diploma is a credential, by which the institution conferring such diploma certifies that the recipient possesses all of the knowledge and skills expected of individuals in an academic discipline (*Matter of Olsson v. Board of Higher Education*, 49 NY2d 408 [1980]; *Matter of McIntosh v. Borough of Manhattan Community College*, 78 AD2d 839, *aff'd* 55 NY2d 913 [1982]; *Levy v. City University of New York*, 88 AD2d 915, *aff'd* 57 NY2d 927 [1982]).

The Regulations of the Commissioner of Education, duly approved by the Regents, have consistently required that students complete certain basic courses and attain a specific number of credits in secondary level courses, and that the schools teach State-prescribed curricula. No rule or practice of the Regents or the Commissioner has created any expectation that students who fail to meet these requirements will be graduated from high school or obtain a diploma. The basic competency tests (BCTs) did no more than test to ascertain whether minimum prescribed levels of educational achievement had been met. The average level of difficulty of those tests was fixed so that the average ninth grade student could answer 80% of the questions correctly. Since these tests were a requirement for graduation at the twelfth grade level, it cannot be contended that they added an additional onerous requirement for graduation or that a secondary school student has been given any expectation of being able to graduate or obtain a diploma with a lesser level of educational attainment. The fact that some schools, contrary to State policy and regulation, may have graduated students who did not reach minimum required levels of education does not entitle all high school students to graduation without having successfully completed a secondary level course of instruction.

The record in this case clearly demonstrates that Abby's reading comprehension is at the third grade level and her mathematics learning objectives in her individual education plan (IEP) are at the second and third grade level. Furthermore, neither her teacher nor the principal of the school she attended, who recommended her for graduation, made any attempt to equate her course of study with a secondary level program. It should be noted

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that when asked to describe what she had taught Abby in social studies during the 1978-79 school year, Abby's teacher testified that she had taught occupational skills, such as job applications and things necessary for a job. Richard's IEP contains goals and objectives which were at a minimal elementary level. While those students may have successfully completed their IEP's, there is no basis upon which to equate that achievement with the attainments required for high school graduation, which include sixteen units of work at the secondary school level. In view of the fact that Abby and Richard could not demonstrate that they had met the requirement of completion of sixteen units of secondary level work, the Court of Appeals understandably concluded that they had "no reasonable expectation of receiving a high school diploma without passing competency tests" (60 NY2d 758, at 761).

Accordingly, respondents submit that the decision below is not inconsistent with the decision in *Debra P. v. Turlington* to the extent necessary to justify review by this Court of the decision below.

### Conclusion

Petitioner Board of Education does not have standing to assert a constitutional claim on behalf of petitioners Abby and Richard. Any apparent conflict between the holdings in the two decisions of the Circuit Courts of Appeals and the Court below is readily resolved by examination of the facts in each case, and consequently does not furnish an adequate basis for granting petitioners' request for a writ of certiorari. Although the issue presented is understandably important to the individual petitioners, they have not demonstrated that there are special and important reasons for granting their petition.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: February 10, 1984.

Respectfully submitted,

ROBERT D. STONE  
*Counsel and Deputy Commissioner  
for Legal Affairs*  
State Education Department  
State Education Building  
Albany, New York 12234  
(518) 474-8864

JAMES H. WHITNEY  
*Of Counsel*